HIGHER EDUCATION AND THE STUDENT UNREST PROVISIONS

In 1844, a Vermont judge refused to hold that a child could compel his father to provide him with a college education on the grounds that the child's peers did not have a college education and that such an education would not substantially benefit the boy.[1] Today, that judge's premises would require the opposite holding,[2] i.e., the father would be compelled—if he had the means and the child had the ability—to provide his child with a college education. Ever increasing technology has turned the college degree into a passport to the managerial labor force.[3] Thus, for children whose parents are financially able to provide them with a college education, the legal recognition of a right to a higher education guarantees these children an opportunity to attend college.[4] But what about those children who have the ability to attend college, yet whose parents are financially unable to provide them with it? Former President Lyndon B. Johnson's "Great Society" attempted to equalize the educational opportunities of rich and poor children.[5] One method was the Higher Education Act of 1965[6] which provided federal financial assistance to the colleges and universities[7] —and most importantly to the students.[8] The 1965 education legislation was designed to increase federal assistance to education but without a parallel increase in federal control of education.[9] Yet, in the Higher Education Amendments of 1968[10] and in several of the educational appropria-

[1] Middlebury College v. Chandler, 16 Vt. *683, *686 (1844).

[2] *See* Note, *College Education as a Legal Necessity*, 18 VAND. L. REV. 1400 (1965). This article discusses the legal obligation of the divorced father to provide his child with a college education. It notes the fact that this obligation is not imposed upon non-divorced fathers. This is so because of the court's policy against judicial interference with parental authority. The non-divorced father, the court assumes, will provide his child with all the necessities and luxuries the child needs and the family can afford. In the majority of cases, this assumption is true. *Id.* at 1400-07. Therefore the court's do not deny the child of a non-divorced father the right to a college education, but only acquiesces in the father's determination that either the child does not have the ability to attend college or the father does not have the funds to send the child to school. *See also* U.N. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, Art. 26.

[3] Dixon v. Alabama State Bd. of Educ., 150 F.2d 150, 157 (5th Cir. 1961) (college is necessary to earn an adequate livelihood and to perform the duties and responsibilities of good citizenship); Soglin v. Kauffman, 395 F. Supp. 978 (W.D. Wis. 1968).

[4] See the qualifications on this statement set out in note 2 *supra.*

[5] Pres. Lyndon B. Johnson's Educational Messages of 1965 and 1968, New York Times, Jan. 13, 1965, at 20, Col. 2; New York Times, Feb. 6, 1968, at 26, col. 1.

[6] 79 Stat. 1219 (1965), 20 U.S.C.A. § 1001 *et seq.* (Supp. 1968).

[7] Library Assistance, tit. II, 79 Stat. 1224 (1965), *as amended,* 20 U.S.C.A. § 1021 (Supp. 1968); Educational Professional Development, tit. V, 79 Stat. 1254 (1965), 20 U.S.C.A. § 1091 *et seq.* (Supp. 1968); Financial Assistance for the Improvement of Undergraduate Institutions, tit. VI, 79 Stat. 1261 (1965), *as amended,* 20 U.S.C.A. § 1121 *et. seq.* (Supp. 1968).

[8] Student Assistance, tit. IV, 79 Stat. 1232 (1965), 20 U.S.C.A. § 1061 (Supp. 1968).

[9] *See* New York Times, March 23, 1969, at 54, col. 2.

[10] Tit. V § 504, 82 Stat. 1062 (1968), 20 U.S.C.A. § 1060 (Supp. 1969) [hereinafter cited as H. E. Amends].

tion acts,[11] Congress, as a response to the turmoil on American campuses, included provisions discontinuing aid to students involved in campus disturbances. Educators and civil libertarians forcefully denounced the legislation, brandishing the Constitutional shibboleths of vagueness, chilling effect, and lack of due process. This strong reaction contains an air of superficiality which suggests the need for a careful consideration of the values represented by these constitutional doctrines in light of the alleged legislative infringements.

The Higher Education Act of 1965 was not the first federal act to give direct financial assistance to students or to the educational institutions. The Servicemen's Readjustment Act (GI bill),[12] the National Science Foundation[13] and the National Defense Education Act[14] were the prototype statutes. The first act was the country's partial payment to those who "made the greater economic sacrifice and every other kind of sacrifice than the rest of us . . . ." during World War II.[15] The last two acts were designed to provide America with the necessary scientists, technicians and teachers to preserve the country's freedom.[16] To accomplish these objectives, the federal government gave those who qualified grants and loans so that they could afford to attend college; the government also gave the colleges and universities funds to provide the necessary classrooms, teachers, and equipment to accommodate the increased influx of students. Although ostensibly designed as a pre- or post-payment for direct service rendered to the country, the acts effectively furnished to a larger segment of society a greater opportunity to attend institutions of higher education.

The Higher Education Act of 1965 continued this objective with three major changes. No longer would payment for service to the country serve as the only reason for extending educational benefits to Americans.[17] Education has become one of the freedoms which the country guarantees its

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11 Departments of Labor, and Health, Education, and Welfare Appropriation Act 1969, § 411, 82 Stat. 995 (1969). [hereinafter cited as Dept. of Labor, and HEW, 1969]; Independent Offices and Department of Housing and Urban Development Appropriations Act, 1969, tit. I National Science Foundation, 82 Stat. 946 (1969) [hereinafter cited as Independent Office Act]; Department of Defense Appropriation Act, 1969, § 540, 82 Stat. 1136 (1969) [hereinafter cited as Dept. of Defense, 1969]; National Aeronautic and Space Administration Authorization Act, 1969, § 1(h), 82 Stat. 281 (1969) [hereinafter cited as NASAA Act]. The H. E. Amends and the above Acts except for NASAA will be referred to as the student unrest provisions or provisions.

12 Ch. 268, tit. IV § 400 *et seq.*, 58 Stat. 287 (1944). See 38 U.S.C.A. § 1601 (1959) for Korean Conflict veterans educational benefits.

13 Ch. 171, 64 Stat. 144 (1950) [hereinafter cited as N.S.F.A.].

14 72 Stat. 1580 (1958) [hereinafter cited as NDEA].

15 New York Times, June 23, 1944, at 32, col. 3 (Pres. Franklin D. Roosevelt's Address upon signing the bill).

16 NDEA § 101, 72 Stat. § 1581 (1958); NSFA § 3, 64 Stat. 149-50 (1950).

17 *See* H. R. REP. NO. 143, 89th Cong., 1st sess. 1, 2 (1965).

inhabitants; everyman, everywhere should be free to develop his talents to their fullest potential.[18]

Secondly, quality rather than quantity of education is stressed. The creators of the "Great Society" recognized that equal educational opportunity does not stem solely from equal access to schools of higher education, but mainly from the availability of effective schooling at all levels of education.[19] Thus special attention was given to marginal schools and students. The best examples of this concern are the head start and financial aid to student programs. The head start program acquaints the child of a low income family with his environment. This process prepares him for the educational process.[20] The aid program provides him with the means and incentive to utilize this process.[21] Instead of finding the educational process abruptly ended at the twelfth grade, when he has the ability to continue, the child is now assured early in his high school career that a college education is possible.[22]

Thirdly, the aid comes in three forms: scholarship grants, loans, and work-studies.[23] The former is probably the most important means of obtaining the act's objective of removing or at least diminishing financial capability as a prerequisite for admission to a college or university.[24] The loan program requires the student to incur indebtness on the prospect of obtaining an education which will enable him to repay the debt. To a student from a poverty stricken family, such a prospect may not be realistic. This is especially true where the family needs the student as a new wage earner.

The work-study program has the same drawback for the poverty family. It calls for lengthening the school period which means lengthening the student's period of dependency upon the family. In addition, the time needed for study is spent working. However, scholarship grants allow the student to attend school without increasing his indebtedness.

As with other programs involving federal and state cooperation, Congress has delegated the responsibility for managing the financial assistance program to the individual colleges and universities.[25] The federal role is to fund the program and to check that guidelines are followed. The main

[18] Pres. Johnson's Educational Message to Congress, New York Times, Feb. 6, 1968, at 26, col. 1.

[19] *See* Pres. Johnson's Educational message to Congress, New York Times, Jan. 13, 1956, at 20, col. 2.

[20] H. R. REP. NO. 143, 89th Cong., 1st Sess. 5-7 (1965).

[21] H. R. REP. NO. 621, 89th Cong., 1st Sess. 23 (1965).

[22] Higher Education Act of 1965 § 408, 79 Stat. 1235 (1965), *as amended*, 20 U.S.C.A. § 1068 (1969). Commissioner of Education is authorized to make contracts for the identification of financially needy children and the publication of the forms of aid.

[23] *Id.* § 401 *et seq.*, 79 Stat. 1232 (1965), 20 U.S.C.A. § 1061 (1968).

[24] S. REP. NO. 673, 89th Cong., 1st Sess. 35-48 (1965).

[25] Higher Education Act of 1965 § 404 (b), 79 Stat. 1233 (1965), 20 U.S.C.A. § 1064(b) (1968).

guideline is that educational institutions have to pick recipients on the basis of need and not on the basis of I.Q. or amount of service to the country. When the number of applicants exceeds the available funds the individual college is allowed to establish additional criteria for the selection of recipients.[26]

Of particular importance to schools was the Congressional admonition against federal intervention into school matters. Section 804 of the Higher Education Act explicitly states that the federal government could exercise no "direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution."[27]

The recent student unrest legislation contradicts at the least the spirit of section 804 when it demands that the universities terminate the recipient's aid upon perpetration of certain proscribed acts. And it is clear that Congress fully intended this result. Congress wanted to exercise direction, supervision, and a certain amount of control over the universities' handling of the campus disorders.[28] Congressional action appears to arise from a proclaimed desire to exercise responsible Congressional control over federal expenditures. The lawmakers thought it irresponsible to provide federal funds to student participants in unlawful collegiate disturbances. Because Congress apprehended this to be misuse of the tax dollar, it determined to correct this abuse by channeling funds to those who will better utilize the money.[29] Thus Congress chose mandatory restrictions upon aid as the remedy, not because it was the best, but because it was the only remedy it felt it had.[30] There exists little authority or precedent for Congressional intervention in university disciplinary matters; and any such intervention may cause more problems than it would solve, not the least of which would be deterioration of the government-university relationship. The student unrest provisions, therefore, are a compromise between the urge for direct federal intervention in campus disorders and the realization that campus disturbances are beyond Congress' ability to control. Congressman Pike probably best expressed Congress' frustration when he said:

> . . . [My children] can do anything they want at college. They can tie

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[26] *Id.*

[27] 79 Stat. 1270 (1965), 20 U.S.C.A. § 1144 (1968).

[28] The original Senate Bill 3769 declared that the university could refuse to award, continue or extend any financial assistance, but the House and the final version make it mandatory that the university deny the aid. 114 CONG. REC. 9054-55 (daily ed. Sept. 25, 1968) (Student unrest provisions).

[29] 114 CONG. REC. 3570 (daily ed. May 9, 1968) (remarks by Congressman Scherle); *Id.* at H 3569 (remarks by Congressman Gross) (Dept. of HEW could not stop graduate students from donating part of their monthly NDEA checks to anti-war organization); *Id.* at 3564 (remarks by Congressman Pike) (Congress should provide the university administration with some new criteria so that some "worthy people" are not deprived of loans because of the lack of funds, while unworthy people receive aid).

[30] S. REP. NO. 1387, 90th Cong., 2d Sess. 19-20 (1968); New York Times, Feb. 16, 1969, at 1, col. 6.

> up the dean. . . . They can steal papers out of the [dean's] office. They can do anything because I am physically unable to prevent them. My son can beat me up, and my daughter is too old for spanking. But if they do these things they are not going to do them at my expense. They are going to do them at their own expense. . . .[31]

The Congressional solutions, in detail, have three basic forms.[32] The first form is section 504 (a) of the Higher Education Act which requires:

> If an institution of higher education determines, after affording notice and opportunity for hearing to an individual attending, or employed by, such institution, that such individual has been convicted by any court of record of any crime which was committed after the date of . . . this Act and which involved the use of (or assistance to others in the use of) force, disruption, or the seizure of property . . . [of any university] . . . to prevent officials or students in such institution from engaging in their duties or pursuing their studies, and that such crime was of a serious nature and contributed to a substantial disruption of the administration of the institution . . . then the institution . . . shall deny for a period of two years [financial aid]. [Also] any institution which such individual subsequently attends shall deny for the remainder of the two year period any [federal aid].[33]

The second form is section 504 (b) of the Higher Education Act which requires:

> If an institution of higher education determines, after affording notice and opportunity for hearing . . . [the] individual has willfully refused to obey a lawful regulation or order of [the] institution after the date . . . of this Act, and such refusal was of a serious nature and contributed to a substantial disruption of the administration of such institution, then such institution shall deny, for a period of two years [federal financial aid].[34]

The third form is section 411 of Department of Health, Education, and Welfare Appropriational Act, which requires:

> No part of the funds appropriated under this Act shall be used to provide a loan, guarantee of a loan or a grant to any applicant . . . convicted . . . of any crime which involves the use of . . . force, trespass or the seizure of property . . . to prevent officials or students . . . from engaging in their duties or pursuing their studies.[35]

From the legislative history of the acts, it seems that Congress wanted the university to take "immediate" retaliatory action against the rioters by discontinuing all sources of federal finance. To accomplish this purpose,

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[31] 114 CONG. REC. 3564 (remarks by Congressman Pike).

[32] U.S. Office of Educ., Bureau of Higher Educ., *Higher Education Reports*, Jan. 28, 1969, 1-3 [hereinafter cited as *Higher Educ. Rep.*).

[33] H. E .Amends tit. V. § 504a. Pub. L. No. 90-575, 82 Stat. 1062 (1968).

[34] *Id.* § 504(b), 82 Stat. 1062 (1968); The Independent Office Act, note 11 *supra*, contains similar language.

[35] Pub. L. No. 90-557, 82 Stat. 995 (1968). Dept. of Defense Act, note 11 *supra*, contains similar language.

yet staying within constitutional limitation, it would appear to be necessary to interpret the acts as complementary. Section 411's lack of procedural due process safeguards would be corrected if read in pari materia with section 504 (a) and (b). Thus a section 411 withdrawal of aid would become mandatory only after notice and a hearing. Conversely, as under section 411, the holding of section 504 (a) and (b) hearings would be mandatory upon the commission of a proscribed act.[36]

However, the Department of Health, Education and Welfare officials, in an effort to maximize university's discretion, have emphasized a literal interpretation of the provisions. The Department perceives the acts to be independent of one another and generally applicable to different situations.[37] This approach emphasizes the disparities present in the acts. Under the Department's interpretation, a discontinuance of aid under section 504(a) and (b) becomes mandatory only if the university makes the specified determinations, whereas under section 411 the discontinuance is automatic upon conviction for the designated crimes. The determinations of section 504 are not mandatory, thus enabling the university to circumvent the consequences of section 504 by disciplining under traditional procedures. Other distinguishing features pointed out by the Department are the following: section 504 acts need to be "of a serious nature" and "contribute to a substantial disruption" while section 411 acts do not; section 411 becomes operative when a "court of general jurisdiction," as opposed to "any court of record" in section 504(a), tenders a guilty verdict, and not after the student has exhausted his appeal rights.[38]

But section 411 lacks section 504's prerequisites of notice and hearing by the institution of higher education and a substantial nexus between the crime and the disruption,[39] thus, opening it to due process and vagueness attack. For that reason, this article will treat section 411 in the only possible practical manner, i.e., in conjunction with section 504 as though it incorporated the procedural safeguards of notice and hearing and a more careful description of the proscribed acts. In this treatment of the basic sections of the Congressional legislation, this article, therefore, diverges from the official administrative interpretation in a belief that the Congressional purpose will be thereby more closely achieved while guarding the student's constitutional rights.

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[36] A more practical reason for construing the acts as being complementary is that § 411 does not specify who is to cut off the aid—the government or the university—while § 504 explicitly requires the university to do so. Most commentators perceive this omission as a selection of the government as the cut off agent. However, the latter has no means of determining who is an aid recipient since the aid is distributed in lump sums to the university. *See* New York Times, March 23, 1969, at 54, col. 6-7 (city ed.).

[37] Cohen, *A Statement on Student Unrest and Federal Legislation* 3 (statement by the Sec'y of HEW, Jan. 15, 1969) [hereinafter cited as Cohen, *A Statement on Student Unrest*].

[38] *Id.* at 3-4; *Higher Educ. Rep.* at 2-4.

[39] Cohen, *A Statement on Student Unrest* at 4.

Colleges and universities, however, find the provisions objectionable no matter which interpretation is adopted. Their main complaint is that the provisions convert probation into automatic expulsion only because the student involved happens to be an aid recipient.[40] This is a direct result of the student unrest provisions' failure to distinguish between acts that merit probation and those that merit dismissal. In their area of coverage, the provisions destroy the flexibility of the traditional university discipline procedure which permits a variety of punitive responses depending upon the severity of the offense and previous record of the student. A university might wish to place an aid recipient on probation, but the legislation requires abrupt termination of aid thereby removing the means of university attendance. So in many circumstances, the university reasons, a recipient of aid will be expelled for his poverty and not for his conduct which only merited probation.[41] And correspondingly a richer student guilty of the same misconduct would continue his education on probation. However, since probation may, under current discretionary university administration of federal funds, serve as a basis for withdrawal or refusal of aid, the logic of the university's reasoning bears closer scrutiny.

Therefore, the actual reason for the antagonism against the student unrest provisions may be the institutions' fear of the consequences of this form of federal encroachment. Although allegedly recognizing the independence of educational institutions,[42] the legislation undercuts that independence through its decision that the institutions have failed to control their students, so Congress will have to do it.[43] But can Congress stop disorders from Washington? Discretion and flexibility in the response of university officials to student disorders are needed. The importance of such discretion and flexibility is illustrated by the recollection that Columbia University's worse incidents arose from student resentment of discriminatory discipline.[44] But the provisions limit such freedom of action.

Also the institutions may be afraid that submission to federal intervention would augur a surrender of their autonomy.[45] This fear might not be as unfounded as one would wish, especially in the light of the implication in President Nixon's educational statement that if the present provisions are not enforced by the college and university more repressive legislation or action might result.[46]

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[40] *Id.* at 6; New York Times, Feb. 16, 1969, at 60, col. 5.

[41] Cohen, *A Statement on Student Unrest* at 6; 114 CONG. REC. 10398-99 (daily ed. Sept. 6, 1968).

[42] See text accompanying note 27 *supra.*

[43] *See* 114 CONG. REC. 10395-401.

[44] *Report of the Fact Finding Commission Appointed to Investigate the Disturbances at Columbia University in April and May 1968* 95-98 (Vintaged ed. 1968).

[45] *See* New York Times, March 17, 1969, at 29 col. 5-6.

[46] *See id.,* March 23, 1969, at 54, col. 4 (Pres. Nixon's address on disorders); *id.* March 17, 1969, at 29, col. 5.

While these considerations demonstrate the undesirability and possible infeasibility of federal intervention, they do not necessarily establish grounds for invalidating the provisions on constitutional grounds.[47] The most often stated constitutional argument against the provisions is the vagueness doctrine. This doctrine consists of two constitutional principles: vagueness or indefiniteness and chilling effect or overbreadth.[48]

The United States Supreme Court in *Connally v. General Construction Company*,[49] while interpreting a penal statute, developed a vagueness test requiring a statute to explicitly inform every ordinary person within its purview of the nature of the conduct proscribed. This test should apply to the unrest provision limitations upon aid whether considered penal or civil in nature since vagueness does not depend upon the penalty but the obedience to a rule or standard that is so indefinite to be really no rule or standard at all.[50] The *Connally* rule requires that the words used in the statute establish a standard of behavior which is not dependent upon the varying impressions of the trier of fact whether the trier be a jury[51] or a public official.[52] Thus the words used must have either a fixed meaning, statutory or judicial definition, or be susceptible to interpretation through the use of legitimate aids to construction.[53]

The importance of the existence of a viable external standard is that it prevents the statute from being given an *ex post facto* construction by the person implementing it. Thus, the vagueness or indefiniteness principle is a procedural due process safeguard. It requires that fair notice of the prohibitted conduct be given to those who wish to avoid the statute's penalties. It also requires that proper standards for adjudication of guilt exist.[54]

But the vagueness doctrine serves a more important function than requiring statutes to have standards from which men of common intelligence[55] can interpret the consequences of their behavior.[56] It has a sub-

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[47] United States v. O'Brien, 391 U.S. 367, 383-84 (1968) (Court does not void legislation on the ground that it is unwise); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting) (determining the wisdom or evil of a law is legislature's function).

[48] Landry v. Daley, 280 F. Supp. 938, 951-53 (N.D. Ill., 1968) (case contains numerous citations). See Collins, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L. REV. 195 (1955). *Cf.* NAACP v. Button, 371 U.S. 415, 432-33 (1963).

[49] 269 U.S. 385 (1926).

[50] Champlin Ref. Co. v. Corporation Comm'n., 286 U.S. 210, 243 (1932).

[51] Connally v. General Const. Co., 269 U.S. 385, 395 (1926).

[52] Cox v. New Hampshire, 312 U.S. 569, 577-78 (1941).

[53] Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

[54] Landry v. Daley, 280 F. Supp. 938, 951 (N.D. Ill. 1968).

[55] Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

[56] NAACP v. Button, 371 U.S. 415, 432-33 (1963); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75-76, 80-81, 96-104 (1960) [hereinafter cited as Note, *Void-for-Vagueness*].

stantive due process aspect.[57] Through the principle of chilling effect or overbreadth, it protects the peripheries of the Bill of Rights' freedoms without a case by case review of the statute's coverage or reach.[58] Statutes with broad applications have inhibiting effects on the personal liberties,[59] thus making them susceptible to sweeping and improper application.[60] Since such statutes could deter exercise of constitutional rights as effectively as an explicit prohibiting statute,[61] the courts demand a precision of regulation coupled with a precision of objective to prevent the perversion of the statute for some illegitimate purpose.[62] This is especially true in the first amendment area.[63] Narrowness of the statute's scope is so important that the courts allow a person whose personal activities might be subject to legitimate regulation to question a statute's broadness.[64]

Anthony Amsterdam, in an often cited article, suggested four factors that should be considered when attempting to decide whether a court should find a statute to be a threat to personal liberties: (1) the nature of individual freedom menaced, (2) the probability of the statute violating that freedom, (3) the deterent effect of the statute, and (4) the practical power of a court to supervise the use of the statute.[65]

When applied to the provisions, Amsterdam's factors indicate that the court should not invoke the void-for-vagueness doctrine. The student unrest provisions affect a fundamental right—freedom of speech—since the "penumbra" of the First Amendment includes academic freedom.[66] Academic freedom, like free speech, is based upon the assumption that society needs to have unfettered exchange of ideas.[67] College and university campuses function as the "marketplace" for this exchange of ideas.[68] On the campuses, the prejudices and preconceptions of the past clash with the evaluations and theories of tomorrow.[69] Since effective exchange of ideas may arouse and excite students,[70] schools (and governments) may be

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[57] Landry v. Daley, 280 F. Supp. 938, 951 (N.D. Ill. 1968).

[58] Keyishian v. Board of Regents, 385 U.S. 589, 601-04 (1967); Note, *Void-for-Vagueness* at 75.

[59] Shelton v. Tucker, 364 U.S. 479, 487 (1960) (citing with approval Mr. Justice Frankfurter's opinion in Wieman v. Updergraff, 344 U.S. 183, 195 (1952)).

[60] NAACP v. Alabama, 377 U.S. 288, 307 (1964); NAACP v. Button, 371 U.S. 415, 433 (1963).

[61] *Cf.* Smith v. California, 361 U.S. 147, 153 (1959).

[62] NAACP v. Button, 371 U.S. 415, 435-36 (1963).

[63] *Id.* at 432.

[64] Dombrovski v. Pfister, 380 U.S. 479, 486 (1965).

[65] Note, *Void-for-Vagueness*, note 56 *supra*, at 94.

[66] Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

[67] Shelton v. Tucker, 364 U.S. 479, 487 (1960).

[68] Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

[69] *Cf.* Terminello v. Chicago, 337 U.S. 1, 4 (1949).

[70] *Id.* at 4-5; See Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968).

inclined to avoid this confrontation through prohibitory regulations and rules. But they can not exclude this confrontation merely because the orderly program of education *may be* disturbed.[71] Limitations on free trade of ideas for the sake of order and the status quo can cause distrust and suspicion which in turn will diminish the open-mindedness necessary for independent inquiry.[72] More importantly, society depends upon the free discussion to make government responsive to the will of the people and thereby provide for peaceful social transformation.[73]

Yet even the penumbra of the First Amendment does not prohibit precisely worded restrictions on speech conduct. These restrictions, however, must occur as a consequence of a "legitimate,"[74] "proper,"[75] "material,"[76] "reasonable,"[77] "substantial,"[78] or "compelling,"[79] government interest in regulating speech conduct. In *United States v. O'Brien*, Mr. Chief Justice Warren attempted to reduce the inherent imprecision in the terms used to describe a lawful government interest. He stated that a governmental regulation is justified when (1) the regulation is within the constitutional power of the government; (2) the regulation furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; (4) the incidental restriction of First Amendment freedoms is no greater than is essential to the furtherance of that interest.[80]

The "substantial" governmental interest involved in the student unrest provisions is a properly functioning school.[81] Congress has declared that higher education is vital to both the Nation and the individual. For this reason, it has exercised its power to spend for the general welfare in order to provide Americans with this twentieth century necessity. Congress has also declared that the disturbances—disruptions, seizures, and trespasses—which plague American campuses jeopardize the Congressional program. Further, Congress stated that the perpetrators of such acts were

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71 *See* Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508-09 (1969) [hereinafter cited as *Tinker v. Des Moines School Dist.*].

72 *Cf.* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Weiman v. Updegraff, 344, U.S. 183, 196-98 (1952).

73 Terminello v. Chicago, 337 U.S. 1, 4 (1949); De Jonge v. Oregon, 299 U.S. 353, 365 (1937).

74 Shelton v. Tucker, 364 U.S. 479, 488 (1960).

75 Bolling v. Sharpe, 347 U.S. 497 (1954).

76 Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613, 618 (MD Ala. 1967); Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966).

77 Tinker v. Des Moines School Dist., 393 U.S. 503, 513 (1969); Blackwell v. Issaque County Bd. of Educ., 363 F.2d 749, 753 (5th Cir. 1966).

78 Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

79 NAACP v. Button, 371 U.S. 415, 538 (1968).

80 United States v. O'Brien, 391 U.S. 367, 377 (1968).

81 *See* Tinker v. Des Moines School Dist., 393 U.S. 503 (1968); Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968).

unsuitable for aid assistance.[82] In summary, the Congressional argument is that the student unrest provisions are designed to protect the financial interest of the United States and to promote the purposes of educational legislation. Although the financial interest of the United States when balanced against the individual's First Amendment rights may be weak, the governmental interest in promoting education should be as strong as any governmental interest involved in the picketing and licensing cases.[83]

If the student unrest provisions infringe upon conduct that symbolizes the beliefs and attitudes of the actor,[84] but which do not "break down the regimentation of the classroom"[85]—the compelling or substantial governmental purpose—the amendments would violate the First Amendment.[86] But these acts are aimed at only unlawful and violent conduct designed to prevent or substantially disrupt the functions of the university;[87] so, they will be valid, unless found to sweep too broadly.[88]

The sweep of a statute encompasses Mr. Amsterdam's second and third factors—the probability that the statute could be used to violate a freedom or used to deter permitted behavior. The issue becomes whether or not the provision could be used to deter students from engaging in protected conduct. The answer should be no. The provision states with enough clarity the prohibited conduct. In sections 504(a) and 411, the words "force," "trespass," "seizure," and "disruption" are used. The first three words have definite legal definitions so students could with a degree of certainty decide what acts or behavior to avoid.[89] Only "disruption," which is used in section 504(a), could be considered ambiguous and thereby afford its enforcer the opportunity to deter permissible student conduct.[90] This ambiguity could be dispelled by reading the word in conjunction with the rest of the subparagraph and with section 411.[91] A second method for clarifying the ambiguity would be for the court, when first construing the statute, to give the word the necessary precision.[92]

Another problem is the subsequent requirement that the act committed

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[82] See text accompanying notes 28-31 *supra.*

[83] *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969). The Higher Education Act of 1968 authorized the Commissioner of Education to protect the interest of the United States and promote the purposes of the act through contract provisions. § 407 (a) (6), 79 Stat. 1235 (1965), 20 U.S.C.A. § 1067(a)(b) (1968).

[84] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943).

[85] *See* Tinker v. Des Moines School Dist., 393 U.S. 503 (1968); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1963).

[86] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[87] *See* Tinker v. Des Moines School Dist., 393 U.S. 503, 509 (1968).

[88] Cox v. Louisiana, 379 U.S. 536, 552 (1965); NAACP v. Button 371 U.S. 415, 432-33 (1963); Soglin v. Kauffman, 295 F. Supp. 978, 985 (W.D. Wis. 1968).

[89] *See* Landry v. Daley, 280 F. Supp. 938, 954 (N.D. Ill. 1968).

[90] *But see* Tinker v. Des Moines School Dist., 393 U.S. 503, 508 (1968).

[91] Landry v. Daley, 280 F. Supp. 938, 956 (N.D. Ill. 1968).

[92] Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

be "of a serious nature and contributed to a substantial disruption . . . ." of the school's administration. This phrase appears in sections 504(a) and (b). Although "serious" and "substantial" have no precise meaning, this imprecision should not be fatal to the provisions. The phrase does not describe the prohibited acts, but rather it limits the scope of the provisions.[93] The trier of fact decides what resulted from the commission of the proscribed acts. If the result was less than a "substantial disruption" —a factual question—the student involved does not lose his aid assistance.

Anthony Amsterdam's final factor is practicability of court supervision of the use of the statute. Where the court does not have the means to supervise, it often employs the doctrine of vagueness as a means of securing jurisdiction.[94] Since the court, through the use of 42 U.S.C. section 1983 and 28 U.S.C. section 1343, has the review power over university disciplinary action,[95] it does not need to use vagueness to guard against improper application of the provisions.

The application of Anthony Amsterdam's factors to the student unrest provisions suggest that a court should not invoke the void-for-vagueness doctrine. But before a court makes any decision, it should consider three other points. First, the provision specifies that the college and university officials are to make the determinations that the student has lost the privilege of being an aid recipient. These officials will make this determination whether or not the provisions are validated. The important question is what due process rights does a student have when that determination is made. The provision affords him the rights that are given a student when being expelled.[96]

Secondly, the provisions define the prohibited acts in relation to the university's need for order. Do university officials, when making the determination, define the prohibited acts in relation to the institution's need for order? Or, in other words, is there a viable external standard which guides the official when he makes disciplinary decisions? The university student disciplinary code could provide this standard. The state legislature when creating the university as a legal entity usually delegates to its governing body full responsibility for the university.[97] That board in turn promulgates basic rules and regulations while delegating to the university administration the authority to make more specific rules or regulations involving the procedural nature of university discipline. These regulations, although not presently written to reflect a distinction between substantial

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[93] Landry v. Daley, 280 F. Supp. 938, 956 (N.D. Ill. 1968).

[94] Note, *Void-for-Vagueness*, note 56 *supra*, at 109-115.

[95] *E.g.*, Buttny v. Smiley, 281 F. Supp. 280, 282 (D. Col. 1968).

[96] *Compare* text accompanying notes 37-39 *supra*, *with* Dixon v. Alabama State Bd. of Educ. 150 F.2d 150 (5th Cir. 1961).

[97] *See* OHIO REV. CODE ANN §§ 1713.02, 1713.08, 3335.01 *et seq.* (Page Supp. 1968).

and non-substantial disturbances, could and should be used to place limitations upon the discretionary actions of administrators.

However in the area of student behavior, the codes of regulation promulgated by the universities are usually all encompassing rules couched in broad comprehensive language.[98] Designed to preserve "good order" and the university's "fair name,"[99] these codes emphasize the averting of unconventional activity rather than the promoting of free inquiry and evaluation, the purpose for which the institutions were created.[100] Traditionally, the courts have granted the universities' community immunity from these requirements and given them wide latitude in the exercise of academic and disciplinary discretion.[101] One commentator attributes the courts' reluctance to strike down a university administrator's judgment as an extension of the deference to the expertise of the educator in the academic realm to the conduct area.[102] A district court judge recently found a different rationale for upholding broad student regulations when he declared that "detailed codes of prohibited student conduct are provocative . . . [therefore] should not be employed in higher education."[103] But this judgment was explicitly rejected in *Soglin v. Kauffman*.[104] The judge in that case accepted the American Association of University Professors' view that student codes need to be "clear and explicit."

The *Soglin* decision was not a radical step. Courts have long held that the universities can not act arbitrarily and unreasonably.[105] More recently in *Dixon v. Alabama State Bd. of Educ.*, the courts have required the universities to protect the procedural due process rights of its students by providing them with notice of a cause for dismissal and a hearing to present their side.[106] Also, they have barred the university from infringing upon the student's basic constitutional values,[107] especially (although perhaps not exclusively) First Amendment rights.[108] The judge in *Soglin* just declared that a vague code violated such values.[109]

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98 Note, *Uncertainty in College Disciplinary Regulation*, 29 Ohio L.J. 1023, 1023-24 (1968) [hereinafter cited as Note, *Uncertainty*].

99 Samson v. Trustees of Columbia Univ., 101 Misc. 146, 147, 167 N.Y.S. 202, 204, *aff'd*, 181 App. Div. 936, 167 N.Y.S. 1125 (1912).

100 *See, e.g.*, Jones v. Tennessee State Bd. of Educ., 279 F. Supp. 190, 195 (M.D. Tenn. 1968); Anthony v. Syracuse Univ. 130 Misc. 249, 259, 223 N.Y.S. 798, 807-08, *rev'd*, 224 App. Div. 487, 231 N.Y.S. 435 (1928); Samson v. Trustees of Columbia Univ., 101 Misc. 146, 147, 167 N.Y.S. 202, 204, *aff'd*, 181 App. Div. 936, 167 N.Y.S. 1125 (1912).

101 Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968).

102 Note, *Uncertainty*, note 98 *supra*, at 1024.

103 Esteban v. Central Mo. State College, 290 F. Supp. 622, 630 (W.D. Mo. 1968).

104 Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968).

105 Anthony v .Syracuse Univ., 130 Misc. 249, 258, 223 N.Y.S. 796, 808 (1927), *rev'd on different interpretation of the facts* 224 App. Div. 487, 491, 231 N.Y.S. 435, 440 (1928).

106 294 F.2d 150, 158-59 (5th Cir. 1961).

107 Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

108 Tinker v. Des Moines School Dist., 393 U.S. 503 (1968).

109 Soglin v. Kauffman, 295 F. Supp. — (W.D. Wis. 1968).

Thirdly, and probably most importantly, the court should remember that if the country is to provide every child with the opportunity to attend college, more colleges, laboratories, libraries, teachers, etc., will be needed.[110] The federal government through Congress will have to finance the program.[111] Will a Congress that can not control the use of its money through the student unrest provisions provide the funds needed for a universal higher education program?

The doctrine of vagueness as a due process safeguard protects the individual from the overreach of governmental action by requiring that statutes which might possibly infringe upon free speech be narrowly drawn and intended to serve a substantial state interest. Particularly in the area of education this protection is necessary if educational institutions are to continue to serve society as the market place for new ideas. Dissent and non-conformity are essential characteristics of a flourishing university. This clash of ideas that takes place within the university informs the American society of the injustices and inequalities which need to be corrected. To bar such dissent would be a perpetuation of these social ills.

At the same time educational institutions need to protect themselves from those that would ravish or pervert their function. The university should neither be the megaphone nor the political basis for the most vocal or violent group—whether it be from the right or left.

Although the student unrest provision usurps part of the university's discretion in disciplinary matters, which is a violation of the unwritten amendment of separation of state and education, they do recognize the need to distinguish between dissent and disruption—allowing the former and prohibiting the latter. And since they rely upon the university conduct codes for their definiteness, they compel the codes to make a similar distinction. Thus the student unrest provision makes clear to the universities the need for definite codes and to state legislatures the form which anti campus disorder legislation should take.

Joseph J. Cox

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[110] Note, *College Education as a Legal Necessity*, 18 VAND. L. REV. 1400, 1407 (1965).

[111] Commission on Education and Labor, *Federal Aid to Higher Education* 5 (1967):

	Amt. (in millions)	%
Federal Assistance Programs	1,581	70.6
State Scholarships	98	4.4
Institutional Programs	513	22.8
Foundations and Corporations	50	2.2
TOTAL	2,242	100.0

See Wall Street Journal, Aug. 19, 1968, at 1 col. 1. (talk about the effects of federal cutbacks on education).